CAUSE NO. 2018-90615

TEXAS CHILDREN'S HOSPITAL,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiffs,	§	
	§	
VS.	§	**HARRIS COUNTY, TEXAS**
	§	
KWOK DANIEL LTD., L.L.P., ROBERT S. KWOK, and THOMAS J. DANIEL	§	
	§	
Defendants.	§	**295TH JUDICIAL DISTRICT**

KWOK DANIEL LTD., L.L.P., ROBERT S. KWOK, AND THOMAS J. DANIEL'S JOINT ANTI-SLAPP MOTION TO DISMISS

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INTRODUCTION

The Court should dismiss this case under the Anti-SLAPP provisions of Texas law because Defendants and the ancillary court are victims of an improperly submitted, retaliatory Temporary Restraining Order ("TRO") and lawsuit designed to strong-arm and silence free speech rights on matters of public concern. Three (3) days after Kwok Daniel Ltd LLP ("Kwok Firm") filed a temporary restraining order to preserve video and medical records from Texas Children's Hospital arising from a baby fatality in the *Jacot* case, Plaintiffs filed this lawsuit and had a TRO signed minutes before close of business on December 21, 2018, the Friday before Christmas break, without appropriate notice, hearing, or affidavit. By their own judicial admission, the proper affiant to support Plaintiff's application for temporary restraining order and temporary injunction is Stacey Cook—but she was "unavailable" (contrary to her sworn testimony at the injunction hearing) to sign the affidavit on December 21, 2018. So instead, Plaintiff's directed their in-house counsel, Tina Conlon, to sign the affidavit before rushing down to the courthouse. Due to the late hour and impending holiday, the ancillary Court did not have time to carefully consider Ms. Conlon's affidavit, which this Court has since declared defective and the TRO declared void from its inception. This Court has also denied TCH's application for temporary injunction on January 14, 2019, implying Kwok Firm's use of the "Broken Promise" mark was critical free speech linked to the *Jacot* news story.

TCH's frivolous claims are precisely what the Legislature intended to weed out by mandating early dismissal of strategic lawsuits against public participation ("SLAPPs"). Kwok Firm merely reported news of a baby's wrongful death at TCH and—perhaps more gallingly to TCH's board—dared to challenge the company with a temporary restraining order to preserve key video evidence depicting the infant's death. Rather than simply defending their conduct concerning the request for video evidence and medical records, TCH retaliated with their own lawsuit against

Kwok Firm.

As in any SLAPP, TCH is not out to win damages, their Promise Campaign was abandoned in November 2018. TCH has no trademark to protect. TCH has no reason to protect an old mark from an expired campaign. Instead, TCH seeks to enforce a so-called infringed "common law trademark" to either stop criticizing TCH or pay through the nose in defense costs. Consequently, TCH's suit makes no sense except as a sledgehammer to deter advocates who dare to carry on a public dialogue about infants who die in Texas Children's Hospital's care.

Fortunately, Texas law offers a remedy for SLAPP victims like Kwok Firm. Immediate dismissal and a fee award are mandatory if either (a) Kwok Firm proves any valid defense by a preponderance of the evidence or (b) TCH fails to supply "clear and specific" proof for every element of every claim. Both grounds require dismissal in this case. TCH certainly lacks "clear and specific" evidence to back up their claims, but perhaps more importantly, Kwok Firm's defenses would defeat every claim even if TCH had a prima face case. Because TCH is suing over acts Kwok Firm took in their role of reporting newsworthy factual events and criticizing TCH with a graphic, Kwok Firm enjoys fair use of any perceived or alleged trademark. The fair use exception to TCH's suit also applies because Kwok Firm made all the factual statements in connection with their graphic in a newsworthy and critical manner.

Beyond Kwok Firm's all-encompassing fair use defenses, TCH's suffers from claim-specific problems. It cannot salvage their dilution claim because Kwok Firm's use of the graphic was both newsworthy and critical of the graphic's owner. In fact, the day Baker Botts sent Defendants the cease and desist letter, a prominent news station had just interviewed Defendant Kwok and the Jacot family and were ready to air a very public exclusive news story about baby Jacot's death at Texas Children's Hospital. But the story didn't air. Baker Botts has since taken

credit for "killing" the news story.

Additionally, Plaintiffs cannot prove that Kwok Firm's use of the graphic was unfair competition that caused a harm. Kwok Firm is a trial law firm in Houston, Texas not in the business of providing professional medical services. So there can be no chance of confusion to potential TCH patients that might affiliate a critical or newsworthy use of a graphic. As such, this suit is abusive and warrants immediate dismissal.[1]

FACTUAL BACKGROUND

A. Texas Children's Hospital retaliates with their own TRO based on a sham affidavit just days after Kwok Firm seeks a TRO.

Defendant Kwok Firm is a trial law firm led by Defendant Robert Kwok, specializing in representing Plaintiffs in wrongful death cases. In mid-December 2018, Defendant Kwok signed up a new infant fatality case at Texas Children's Hospital and had posted a news article on the firm website.

On December 18, 2018, Defendant Kwok filed TRO proceedings against Plaintiff seeking a TRO in *Cause No.: 2018-89549; Eric and Claire Jacot, Individually and as Representatives of the Estate of Amiyah Jacot, Minor Child, Deceased vs. Texas Children's Hospital, Texas Children's Physician Group, Texas Children's, Elaine Fielder, M.D., and Christopher Cadiang; In the 190th Judicial District Court of Harris County*. Kwok Firm sought the TRO to preserve key video evidence in the new infant death case against Texas Children's Hospital. However, rather than sign the TRO, the ancillary Judge waited for all parties to appear, and over the course of two (2) days instructed the parties to reach an agreed order, signed on December 19, 2018. *See Agreed*

[1] For ease of reference throughout this motion, "Kwok Firm" collectively refers to both Kwok Daniel Ltd L.L.P. and their agent employees Mr. Kwok and Mr. Daniel unless an express distinction is made. Both Kwok Daniel, Mr. Kwok, and Mr. Daniel join in and assert the benefit of all arguments and evidence submitted in this motion.

Order attached as Exhibit "A" and incorporated by reference.

On December 20, 2018, the news sent an Emmy-award winning reporter to interview Defendant Kwok and the Jacot family in an exclusive story about the new infant fatality case at Texas Children's Hospital. But the story never aired. Instead, Texas Children's Hospital stopped the press through their communications with the news and a cease and desist letter to Defendants. *See Baker Botts cease and desist letter dated December 20, 2018 attached as Exhibit "B" and incorporated by reference.* Baker Botts takedown letter demanded that Kwok Firm immediately remove their "Broken Promise" graphic linked to the *Jacot* news story on Kwok Firm's website.

On December 21, 2018, the Friday before Christmas break, TCH sent a second cease and desist letter and hours later sued Kwok Firm claiming dilution and unfair competition from the "Broken Promise" graphic linked to the *Jacot* news story, seeking equitable remedies and punitive damages. Around 5:50 p.m. on December 21, 2018, TCH's lawyers at Baker Botts e-mailed a copy of the signed (but defective) TRO to Kwok Firm, but everyone was already gone for the Christmas holidays. *See Baker Botts cease and desist letter dated December 21, 2018 and email attached as Exhibits "C" and "D".*

On December 22, 2018, the Saturday before Christmas, Baker Botts sent yet another letter threatening sanctions to Kwok Firm, but Kwok Firm was closed for the Christmas Holidays. *See letter dated December 22, 2018 attached as Exhibits "E".* By now, Baker Botts knew Defendant Kwok was out of the Country celebrating Christmas with his family, yet they persisted in making unreasonable demands during the Christmas holiday.

On December 24, 2018, Christmas eve, Baker Botts sent another threatening e-mail ordering Kwok Firm to remove their "Broken Promise" graphic. After a series of communications between Baker Botts and Kwok Firm's senior associate, Garrett Wilson, Baker Botts agreed to withhold filing

sanctions in exchange for Kwok Firm changing out the "Broken Promise" graphic by close of business on December 26, 2018. *See both e-mails dated December 24, 2018 attached as Exhibit "F" and "G".*

On December 26 around 3 p.m., Kwok Firm located their web designer on Christmas vacation, who was kind enough to create a replacement graphic and post before Baker Botts' deadline. But TCH disliked the replacement graphic because it somehow "conjured up" memories of the "Broken Promise" graphic. So, Baker Botts sent another threat letter to Kwok Firm and then filed a Motion for Contempt and Request for Sanctions against Kwok Firm, violating the December 26, 2018 agreement. *See Baker Botts sanctions letter attached as Exhibit "H" and Motion for Contempt attached as Exhibit "I".*

On January 2, 2019, knowing Mr. Kwok would not be back in town until January 4, 2019, Baker Botts set their Motion for Contempt and Motion for Temporary Injunction for oral hearing on January 3, 2019. Mr. Kwok was forced to engage counsel (Dale Jefferson's firm) to assist with the hearing Baker Botts set without conferring with Kwok Firm, but the Court was gracious to move all related hearings to January 10, 2019.

On January 8 and 9, 2019, Kwok Firm's process server attempted to serve affiant Tina Conlon with subpoena for the injunction hearing, but she dodged service on multiple occasions.

On January 9, 2019, Kwok Firm's process server then attempted service on Baker Botts counsel Ali Dhanani during a 4:30 p.m. conference call with the Court, but Mr. Dhanani was "not in the office" per Baker Botts receptionist. During the conference call, supposedly not in the office, Mr. Dhanani told the Court that Ms. Conlon was not the person TCH intended to call for the injunction hearing, that a better witness Stacey Cook should have signed the affidavit, but she was "out of town" on December 21, 2018, when Baker Botts got Judge Hawkins to sign their TRO. But Ms. Cook

testified under oath she was "in town" and "available" to sign an affidavit on December 21, 2018 and no one has asked her to. During the call Defendant Kwok asked Baker Botts to accept service for Ms. Conlon, but they refused saying "you know our position on this witness." So, Defendant Kwok Firm had Ms. Conlon served at her home around 7 p.m. This was not without drama, as Ms. Conlon called the police to arrest Kwok Firm's process server, but in a turn of events, the Friendswood police arrived and assisted Kwok Firm's process server in serving Ms. Conlon.

On January 10, 2019 around 10 a.m., Baker Botts filed a motion for protection for Tina Conlon, the affiant for the TRO and TI. Kwok Firm immediately filed a Motion to Compel which the Court heard at the January 10, 2019 injunction hearing, right after the Court dissolved TCH's TRO finding the affidavit was "defective" and the TRO was "void from its inception." *See Order dissolving Texas Children's Hospital's TRO attached as Exhibit "J".*

Then Baker Botts immediately withdrew their motion for contempt on the record.

On January 10, 2019 at 1:30 p.m., Kwok Firm and Jefferson Firm co-counselled the injunction hearing that lasted around 4 hours. During the hearing Ms. Cook testified the Promise Campaign had ended in November 2018. So, it came to light - Baker Botts was seeking to protect a graphic they had no trademark on, for a campaign that was abandoned – all amounting to protecting nothing. The Court asked for post-hearing briefing, with Defendants' response due Monday, January 14, 2019 at 9 a.m. Defendants generated a brief response over the weekend. After considering the post-hearing briefing, the Court denied Plaintiffs' application for restraining order on January 14, 2019, implying Kwok Firm's use of the "Broken Promise" graphic linked to the *Jacot* news story was protected free speech under Texas and Federal law. *See Order denying temporary injunction on file with the Court.*

So here we are, literally hundreds of attorney hours later, Defendants suffered a wasted

Christmas break defending Kwok Firm and the two (2) partners from a baseless barrage of legal threats all designed to "chill" the momentum of the *Jacot* case, kill the *Jacot* news story with KPRC, and retaliate against Kwok Firm for filing their own TRO just days before. No person in their right mind could conclude that Texas Children's Hospital sponsored this newsworthy headline on the website of a personal injury law firm reporting on the temporary restraining order that had been filed. The baselessness of this argument reflects Plaintiff's real motive in this case – to chill Defendants' free speech and association rights.

ARGUMENT AND AUTHORITIES

All of TCH's claims are subject to the anti-SLAPP dismissal procedure because they are based on Kwok Firm's rights of free speech and free association. Because Kwok Firm is shielded by fair use, the TCPA requires Plaintiffs' claims to be dismissed. Additionally, the TCPA requires Plaintiffs' claims to be dismissed because TCH has no "clear and specific" evidence to support all elements of all claims, which are also barred by other valid defenses. For these reasons, Kwok Firm asks the Court to dismiss Plaintiffs' suit, award Kwok Firm their fees and expenses, and impose the TCPA-mandated fine on TCH.

A. Standard of Review

This motion arises under the Texas Citizens Participation Act ("TCPA"), which exists to "encourage and safeguard the constitutional rights of persons to petition, speak freely, and associate freely." TEX. CIV. PRAC. & REM. CODE § 27.002. To prevent "Strategic Lawsuit Against Public Participation" from achieving their intended purpose of stifling constitutional rights, the TCPA permits early dismissal after no discovery. TEX. CIV. PRAC. & REM. CODE §§ 27.003, 27.006; *see also Rehak Creative Servs. Inc. v. Witt*, 404 S.W.3d 716, 719 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (defining "SLAPPs"). Defendants move the Court to stay the Nine (9) sets of discovery Plaintiffs sent to Defendants sent on January 10, 2019 under the TCPA.

Motions to dismiss under the TCPA involve two steps. *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). First, Kwok Firm must show "by a preponderance of the evidence that the lawsuit is based on, relates to, or is in response to the party's exercise of their right to free speech, the right to petition or the right of association." TEX. CIV. PRAC. & REM. CODE § 27.005(b). A cause of action "relates to" these rights so long as it has any "connection with" a protected statement. *Rehak*, 404 S.W.3d at 733–34 (trademark misappropriation claim "related to" free speech because trademark appeared on political web site). For this first step, all doubts must be resolved in favor of the statute's application because the TCPA is "construed liberally to effectuate their purpose and intent fully." *See* TEX. CIV. PRAC. & REM. CODE § 27.011(b).

Once Kwok Firm shows that the claims relate to free speech, petitioning, or association, the burden shifts to TCH to avoid dismissal by producing "clear and specific evidence [of] a prima facie case for each essential element" of each claim. TEX. CIV. PRAC. & REM. CODE § 27.005(c). If TCH cannot meet that burden, the case must be dismissed. *Id*. Even if TCH does submit clear evidence of a prima facie case, dismissal is still required if Kwok Firm "establishes by a preponderance of the evidence each essential element of a valid defense to the [TCH's] claim." *Id*., § 27.005(d).

B. TCH's claims are subject to anti-SLAPP dismissal because they relate to Kwok Firm's rights of free speech and association.

TCH admits that all of their claims are based on Kwok Firm's use of the graphic on their Kwok Firm's website. Pet. ¶¶ 1–45. Kwok Firm's use of the graphic relates to (a) factual statements surrounding the infant death at TCH and (b) a graphic that contains the word promise with a black jagged line through it. The Court need not decide whether free speech, petitioning, and association rights are implicated; any one suffices to trigger the TCPA. *Deaver v. Desai*, 483 S.W.3d 668, 672 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

1. TCH's claims are based on, relate to, and are in response to Kwok Firm's exercise of their right of free speech on matters of public concern.

TCH bases each cause of action on Kwok Firm's use of their graphic on their website, stating that it dilutes TCH's common law trademark. Pet. ¶¶ 1–10. TCH cannot conceal that it sued Kwok Firm in response to free speech. Under the TCPA, "the right of free speech" includes any "communication made in connection with a matter of public concern." TEX. CIV. PRAC. & REM. CODE § 27.001(3). "Matter[s] of public concern" are any issues related to "(A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace." *Id.*, § 27.001(7). Kwok Firm's statements are "free speech" because they relate to at least three public concerns:

Health or safety. Kwok Firm's use of the graphic was to address a broken promise to a family and their deceased child – "health or safety." *See, e.g.,* Pet.¶ 20-25. Indeed, the Texas Supreme Court has found a "health" concern under the TCPA in circumstances involving far less public outcry. *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015). (finding "public concern" based on internal emails to the effect that one nurse "violated the company's sterile protocol policy") *with* Pet. ¶ 41 (noting that "consumer" could read or be misled about the facts contained in Defendant's statements in connection with the graphic). Under any reading of the TCPA, children's treatment and health at TCH are a matter of public concern.

Environmental and community well-being. Some of Kwok Firm's statements and use of the graphic refer to, and all are intended to prove, TCH's violations of the standard of care in caring for children in the community. Consequently, the statements involve the public concern of "environmental . . . well-being." *See* TEX. CIV. PRAC. & REM. CODE § 27.001(7)(B). Additionally, Kwok Firm's statements relate to TCH's treatment of children at a "high-profile" hospital frequented by "millions" of patients. Pet. ¶ 11. Child welfare—and the medical standard of care in the community

specifically—are matters of community well-being. Courts have found "community well-being" at stake under the TCPA in matters far more routine than the standard of medical care as applied to children. *See Deaver*, 483 S.W.3d at 673 (accusing man of identity theft); *Neyland v. Thompson*, No. 03–13–00643–CV, 2015 WL 1612155, at *5 (Tex. App.—Austin Apr. 7, 2015, no pet.) (mem. op.) (feud within homeowner's association); *Bilbrey v. Williams*, No. 02–13–00332–CV, 2015 WL 1120921, at *11 (Tex. App.—Fort Worth Mar. 12, 2015, no pet.) (mem. op.) (statements about coach's angry behavior during children's baseball game). Kwok Firm's use of the graphic concerns medical care that could directly affect the well-being of the "million" members of the community who use TCH every year.

***Service in the marketplace*.** Kwok Firm's use of the graphic and factual statements concerning an infant death at TCH were related to "service in the marketplace"—medical treatment—and is thus a public concern. *See* TEX. CIV. PRAC. & REM. CODE § 27.001(7)(E). TCH markets themselves as "consistently ranked among the top children's hospitals in the nation." Pet. ¶ 11. As part of their mission, TCH attempts to provide "the best quality to care to all of their patients," TCH adopted the ""promise campaign" to further their key goals "to offer hope, comfort and healing to the sickest children; to understand that a child's emergency can't wait." *Id*. Because Kwok Firm's statements and use of the graphic relates to these services, they involve a "matter of public concern" under the TCPA. *See, e.g., Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 308 (Tex. App.—Dallas 2013, no pet.) (online review of pool builder was "public concern" under TCPA); *Avila v. Larrea*, 394 S.W.3d 646, 655 (Tex. App.—Dallas 2012, pet. denied) (attorney's legal services involve "public concern" under TCPA). The linked temporary restraining order, press release, and graphic were posted to elicit public awareness of and support for preservation of the video and medical records. *See id.*, ¶ 20. Kwok Firm's attempts to elicit public support present still further

reasons why the statements equate to associating. *See* TEX. CIV. PRAC. & REM. CODE § 27.001(3). Because all of TCH's claims are a direct response to the public statement, call for preservation of relevant evidence, and use of the graphic, the claims implicate the right to associate and are subject to dismissal under the TCPA.

2. TCH's claims are based on, relate to, and are in response to Kwok Firm's exercise of their right to freedom of association.

TCH's claims also relate to Kwok Firm's exercise of their "right of association," which protects communications "between individuals who join together to collectively express, promote, pursue, or defend common interests." TEX. CIV. PRAC. & REM. CODE § 27.001(3). The "common interests" need not involve any public, let alone salutary, concerns. *See Fawcett v. Rogers*, 492 S.W.3d 18, 24 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (holding that "right of association" encompasses private emails about mismanagement of Mason lodge).

All of TCH's claims are based on statements Kwok Firm posted on their website. Pet. ¶¶ 10. For instance, Kwok Firm states on their website in connection with the graphic that a seventeen-day-old infant died at TCH hospital. ¶ 20. Such factually true statements involve Kwok Firm's right of association with like-minded advocates. Like anyone else, Kwok Firm uses their website in the hopes that visitors will express, promote, pursue, or defend a common interest they may share with Kwok Firm—improving the medical treatment of children. Applying that rationale, a Texas court has expressly held that Facebook posts about common interests in animals are a form of protected "association" under the TCPA. *Backes*, 486 S.W.3d at 20–21 (applying TCPA because people "have the right to associate with each other on social media, particularly when it involves a common interest such as horse breeding").

Additionally, the dilution and unfair competition claims directly target the right of association. A claim for unfair competition "is the umbrella for all statutory and non-statutory causes of action

arising out of business conduct which is contrary to honest practice in industrial or commercial matters." *United States Sporting Prods., Inc. v. Johnny Stewart Game Calls, Inc.,* 865 S.W.2d 214, 217 (Tex. App.-Waco 1993, writ denied) (quoting *American Heritage Life Ins. Co. v. Heritage Life Ins. Co.,* 494 F.2d 3, 14 (5th Cir. 1974)). Had any such unfair competition occurred, those statements and use of the graphic by Kwok Firm and visitors to their website would fall within the TCPA's broad "right of association." With the rights of free speech and free association which are all at stake, Kwok Firm has more than satisfied their burden of showing by a preponderance of the evidence that the anti-SLAPP dismissal procedure applies.

C. Even if TCH could establish a prima facie case on statutory dilution, TCH's dilution claim is barred by the statutory fair use exception.

Because the anti-SLAPP law applies, the Court moves to step two: deciding if dismissal is warranted. Later in this motion, Kwok Firm explains on a claim-by-claim basis why TCH has no case and why Kwok Firm has valid defenses. But the Court need not undertake a claim-specific study to dismiss this case. Independent of their other flaws, TCH's dilution claim against Kwok Firm is barred by the fair use exception. Therefore, dismissal is due. TEX. CIV.PRAC. & REM. CODE § 27.005(d) ("[T]he court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim."); *Tervita, LLC v. Sutterfield*, 482 S.W.3d 280, 285 (Tex. App.—Dallas 2015, pet. denied) (dismissing case under TCPA because defendant established that judicial-proceeding privilege applied).

The fair use exception provides an extra layer of protection. The statute carves out specific exemptions squarely in line with Defendants' fair use on their website. In fact, TEX. BUS. AND COM. CODE 16.103 (d)(1)(B) & (d)(3), expressly prohibits their a request for injunction (like the one Plaintiff seeks here) or cause of action based on dilution under the exact circumstances

presented in this case. That chapter states in pertinent part:

> **(d) A person may not bring an action under this section for:**
> (1) a **fair use**, including a nominative or descriptive fair use, or facilitation of the fair use, of a famous mark by another person other than as a designation of source for the person's own goods or services, including a fair use in connection with:
> (A) advertising or promoting that their consumers to compare goods or services; or
> **(B)** ***identifying and parodying, criticizing, or commenting on the famous mark owner or the famous mark owner's goods or services;***
> (2) a noncommercial use of the mark; or
> **(3)** ***any form of news reporting or commentary (emphasis supplied).***

Not only does TCH fail to meet their burden to establish the generic word "promise" as a "famous" term as multiple health care providers use the same term to raise money, Kwok Firm's use of the graphic constitutes news commentary that criticized TCH's medical services. Defendants "fair use" cannot sustain a cause of action or this request for injunction. Because TCH's dilution claims are based on a newsworthy and critical graphic created by Kwok Firm, the statutory exception applies and TCH's claim should be dismissed.

D. Even if the claims were not barred by fair use, this suit must be dismissed because TCH has no "clear and specific" proof to support the claims.

In a case where fair use did not apply, TCH could attempt to defeat this motion by offering "clear and specific" evidence of a prima facie case for all elements of all claims. TEX. CIV. PRAC. & REM. CODE § 27.005(c). TCH's burden exceeds the "scintilla" standard that applies to no-evidence motions for summary judgment. *Rehak*, 404 S.W.3d at 726. "The words 'clear' and 'specific' in the context of this statute have been interpreted respectively to mean, for the former, 'unambiguous,' 'sure,' or 'free from doubt' and, for the latter, 'explicit' or 'relating to a particular named thing.'" *Lipsky*, 460 S.W.3d at 590. TCH has no such evidence.

Although the Texas Supreme Court has clarified that the "clear and specific" standard is

looser than some originally understood it,[2] the TCPA remains potent. In *Lipsky* theirelf, for instance, the Supreme Court found that a business disparagement claim failed because the only proof of damages—an affidavit asserting "direct pecuniary and economic losses . . . and loss of goodwill in the communities in which it operates . . . in excess of three million dollars"—was too "conclusory" to count as "clear and specific" evidence. *Id*. at 592.

Additionally, the TCPA's greatest power after *Lipsky* resides in section 27.005(d), which provides that "notwithstanding the [non-movant's ability to show a prima facie case], the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense." TEX. CIV. PRAC. & REM. CODE § 27.005(d). Because Kwok Firm need only prove their defenses by a "preponderance of the evidence" to win dismissal under the TCPA, their burden is less than required to win traditional summary judgment. *Compare Bradt v. West*, 892 S.W.2d 56, 65 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (requiring summary judgment movant to "conclusively establish" defenses to a point that "ordinary minds cannot differ"). Especially under this "valid defense" rule in section 27.005(d), TCH's claims all fall short.

1. <u>Common Law Trademark Infringement</u>

TCH's entire case rests on the unsupported assertion they somehow own a trademark in the word "Promise" in white font that rests on a red background. However, Plaintiffs offer no evidence to support this unfounded assertion. A review of the United States Patent and Trademark Office Official filings reveals no such filing. Despite not having a registered

[2] In *Lipsky*, the Supreme Court (1) clarified that courts may consider circumstantial evidence so long as the circumstances are "clear and specific" and (2) specified that both evidence and pleading allegations, when taken together, may suffice to ward off dismissal. 460 S.W.3d at 590–91. For pleadings to count toward a non-movant's TCPA burden, "general allegations that merely recite the elements of a cause of action—will not suffice." *Id.*

trademark in the generic term "Promise" Plaintiffs filed this TRO, purportedly based on common law grounds, even though TCH's own marketing campaign differs drastically from the "broken promise" graphic used by Defendants. Further, TCH is fully aware Defendants are not their competitors, as they exist in entirely different industries, and any reference to TCH through Kwok Firm's news reporting was intended for information and criticism.

To establish trademark infringement, TCH must establish: (1) the name it seeks to protect is eligible for protection; (2) it is the senior user of the name; (3) there is a likelihood of confusion between their mark and that of their competitor*;* and (4) the likelihood of confusion will cause irreparable injury for which there is no adequate legal remedy (emphasis supplied). *Thompson v. Thompson Air Conditioning and Heating, Inc.*, 884 S.W.2d 555, 558 (Tex.App.—Texarkana 1994, no writ). The issues in a common law trademark infringement action under Texas law are no different than those under federal trademark law. 439 F. Supp. 551, 488 *(N.D. Tex. 1977).*

Thus, the party seeking to establish trademark infringement must first establish that the name it seeks to protect is eligible for protection. *Id.* at 488–89 Whether a word or phrase is eligible for protection is determined by the category to which is belongs: (1) generic; (2) descriptive; (3) suggestive; or (4) arbitrary. *Id.* at 489. Generic terms are never eligible for protection, whereas descriptive terms may only be protected after the party seeking to establish infringement provides proof that the term for which it seeks protection has a secondary meaning. Per TCH, "promise" is a generic term, and thus not subject to trademark.

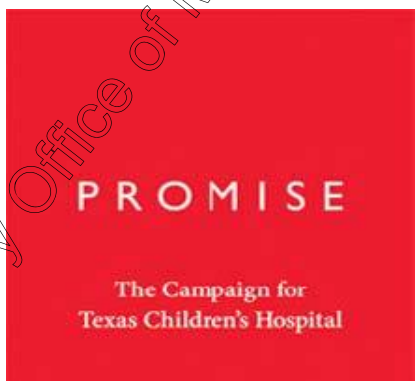
Further, the generic graphic of TCH in comparison with the Kwok Firm graphic leaves no likelihood of confusion. Kwok Firm is a law firm dedicated to protecting victims of wrongful death from negligence. Texas Children's Hospital provides health care. TCH bears the burden of proving Kwok Firm's use of a symbol will create confusion in the minds of consumers. To the

extent that TCH asserts that patients would be confused by Kwok Firm's use of the graphic, the factors for likelihood of confusion are:

(1) the strength of the plaintiff's mark;
(2) the similarity of design between the two marks;
(3) the similarity of the products or services;
(4) the identity of the retail outlets and purchasers;
(5) the similarity of advertising media used;
(6) the defendant's intent;
(7) evidence of actual confusion; and
(8) the degree of care exercised by potential purchasers.

Am. Rice, Inc. v. Producers Rice Mill, Inc., 518 F.3d 321, 329 (5th Cir. 2008). TCH argues that patients could confuse or affiliate Kwok Firm with TCH based on Kwok Firm's use of the graphic. Considering the factors above, that argument could not fall further from reality.

First, TCH cannot demonstrate that Kwok Firm's purported infringement is likely to cause confusion among the relevant consumers. TCH's alleged distinct mark, no longer in use, contains the word promise in white letters on a "U of H red" square background:

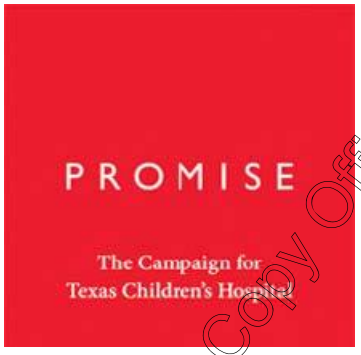


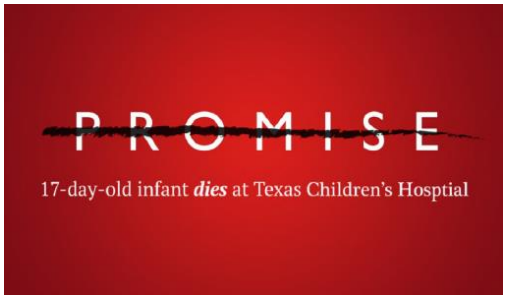
Despite a plethora of similar color schemes around the State of Texas, TCH maintains that Kwok Firm's variation of the graphic infringes and dilutes the above graphic. Case law does not support this assertion. For instance, in *Bank of Tex. v. Commerce Southwest, Inc.* the court held that a name such as Bank of Texas is not inherently distinctive, in that it combines the generic term 'bank' with the geographical term 'Texas.' 741 F.2d 785, 787 (5th Cir. 1984). Rather, the name is descriptive of the

type of services offered and the place from which such services originate." *Id.*

TCH did not conduct a survey to measure the mark reaction to Kwok Firm's graphic. The market's reaction is necessarily a compilation of the eight factors of likelihood of confusion For example, survey results showing a likelihood of confusion portends some degree of mark similarity. Survey results showing a likelihood of confusion portends some degree of strength in the senior user's mark. Regardless of the survey results, the sophistication of the relevant purchaser is accounted for as well. Despite this, TCH has not and cannot prove through a survey, or otherwise, that there is a likelihood of confusion to relevant consumers, likely because the promise campaign ended in November 2018.

Likewise, the designs of the two graphics are dissimilar. Kwok Firm's mark contains a different red with white letters and the word promise with a mark through it. There is insufficient similarity between the two (TCH left, Kwok Firm right) to confuse consumers:





This Court must look whether the junior user's graphic causes confusion or causes mistake as to the affiliation, connection, or association with another person, or as to the origin, sponsorship, or approval of goods, services, or commercial activities by another person. TCH cannot show a similarity between the services provided by the parties, similarity in advertising media, evidence of actual confusion, or show a degree of care that would be exercised by potential purchasers of the parties' services. To even hint that a purchaser, consumer, or patient would affiliate Kwok

Firm's use of the graphic with TCH or somehow be confused as to why TCH would sponsor Kwok Firm's statements is illogical (and offensive to the intelligence of Texas citizens). This argument fails as TCH cannot carry their burden of proof under these factors.

2. Dilution

To avoid dismissal of their dilution claim, TCH needs "clear and specific" evidence that Kwok Firm infringed on a mark which must be famous, distinctive, and use of the mark is likely to cause dilution. By at least a preponderance of the evidence, Kwok Firm has established two valid defenses: fair use of the graphic for newsworthy purposes and for criticizing the mark's owner. Additionally, TCH has no clear and specific evidence to prove any element of dilution, and their proof is particularly lacking with respect to the mark being famous and any use of the mark likely to cause dilution.

Dilution can occur by blurring or dilution by tarnishment. TEX. BUS. & COM. CODE § 16.001. "Dilution by blurring" means an association arising from the similarity between a mark or trade name and a famous mark that impairs the famous mark's distinctiveness. *Id.* "Dilution by tarnishment" means an association arising from the similarity between a mark or trade name and a famous mark that harms the famous mark's reputation. *Id.* Kwok Firm's differing graphic neither harmed or impaired TCH's promise graphic. There are differences between the two, including color, font, and a slash through a generic noun or verb that prevents consumers from associating the two with each other. The court's analysis of the statute does not stop there, TCH must also show that their mark is famous and distinctive.

For use of a mark to be considered diluted, the mark must be famous and distinctive, and the use of the mark or trade name must be likely to cause the dilution of the famous mark. TEX. BUS. & COM. CODE § 16.003. "A mark is considered to be famous if the mark is widely recognized by

the public throughout this state or in a geographic area in this state as a designation of source of the goods or services of the mark's owner." *Id.* In determining whether a mark is famous, a court may consider factors including:

> (1) the duration, extent, and geographic reach of the advertisement and publicity of the mark in this state, regardless of whether the mark is advertised or publicized by the owner or a third party;
>
> (2) the amount, volume, and geographic extent of sales of goods or services offered under the mark in this state;
>
> (3) the extent of actual recognition of the mark in this state; and
>
> (4) whether the mark is registered in this state or in the United States Patent and Trademark Office. *Id.*

Courts have universally held that the bar for fame is extraordinarily high. *TCIP Holding Co. Commc'ns* , 244 F.3d 88, 100–01 (2d Cir. 2001) To achieve fame, the mark must be "so ubiquitous and well-known to stand toe-to-toe with Buick or KODAK." *Bd. of Regents, Univ. of Tex. Sys. v. KST Electric, Ltd.*, 550 F. Supp. 2d 657, 678 (W.D. Tex. 2008). Only a "select class of marks— those marks with such powerful consumer associations that even non-competing uses can impinge on their value" are considered famous. *Id.* at 674; *Avery Dinnison Corp. v. Sumpton*, 189 F.3d 868, 875 (9th Cir. 1999) ("Dilution is a cause of action invented and reserved for a select class of marks—those marks with such powerful consumer associations that even non-competing uses can impinge their value.").

Board of Regents v. KST Electric, Ltd., is particularly instructive on this topic. 550 F. Supp. 2d 657. In that case the University of Texas brought an action for dilution relating to the use of the Texas Longhorn silhouette. While the Court conceded many Texans and people living outside of Texas would recognize the silhouette and their connection to the University Athletic teams, the Court granted nonetheless summary judgment in favor of the defendants finding the longhorn silhouette is not famous. Nor is the maker's mark whiskey red seal *Maker's Mark Distellery v.*

Diagea 703 F. Supp. 2d 671-700 (W.D. KY 2010) or the MENSA mark *Am. Mensa v. Inpharmatic*a 2008 U.S. Dist. LEXIS 99394 (D. Md.. Nov 6., 2008).

In the present case, TCH's assertion of fame falls flat. Indeed health care providers across the nation use the term "promise" in connection with healthcare. Promise is simply a noun or a verb too generic to for one hospital in a region to use as their claim to fame. Plaintiff cannot meet the high bar required for fame. Finally, nothing about Kwok Firm's use of that graphic interferes with TCH's ability to provide medical services, even services that injure or kill their patients. TCH's graphic is not harmed or impaired by Kwok Firm's graphic, mainly because it is no longer in use, nor is it famous or distinct enough to be considered under the Texas dilution statute. TCH's dilution claim should be dismissed.

3. Unfair Competition

TCH claims that somehow, Kwok Firm's use of the graphic is unfair competition. Pet. ¶¶ 31-37. Such an assertion is absurd, no consumer visiting Kwok Firm's website would confuse the use of the graphic or services provided by Kwok Firm with that of TCH. Unfair competition requires the plaintiff show an illegal act by the defendant that interfered with the plaintiff's ability to conduct their business. *Schoellkopf v. Pledger,* 778 S.W.2d 897, 904-05 (Tex. App.-Dallas 1989, writ denied). The illegal act need not necessarily violate criminal law, but must at least be an independent tort. *Id.* ("Without some finding of an independent substantive tort or other illegal conduct, we hold that liability cannot be premised on the tort of "unfair competition."'). Here, Kwok Firm's use of the graphic falls is not part of any illegal act, it just brings the news. TCH's pleading fails to identify a single independent tort committed by Kwok Firm. TCH's argument fails as it cannot satisfy their burden to meet the elements of unfair competition.

E. Because dismissal is proper, Texas law requires awarding Kwok Firm their attorneys' fees and fining TCH to discourage future SLAPP actions.

If the Court dismisses TCH's claims, then it "shall" award Kwok Firm their "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require." TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1). In other words, the TCPA mandates the award of fees and costs if Kwok Firm prevails. *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016) ("Based on the statute's language and punctuation, we conclude that the TCPA requires an award of 'reasonable attorney's fees' to the successful movant."). At or before the hearing on this motion, Kwok Firm will supply evidence of the fees and expenses it has incurred to that point.

Additionally, the TCPA requires "sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions." TEX. CIV. PRAC. & REM. CODE § 27.009(a)(2). Because the TCPA says "shall," the issuance of some sanction is mandatory. *Kinney v. BCG Attorney Search, Inc.*, 2014 WL 1432012, at *11 (Tex. App.—Austin Apr. 11, 2014, no pet.). In previous cases involving dismissal under the TCPA, courts have determined sanctions by consulting (a) the plaintiff's annual profit, (b) the amount of attorneys' fees incurred, (c) the plaintiff's history of filing similar suits, and (d) any aggravating misconduct, among other factors. *See Kinney* at 2014 WL 1432012, at *12; *Am. Heritage Capital*, 2014 WL 2946005, at *13-14. The overriding question is what sanction will deter the plaintiff from pulling the trigger so quickly on future SLAPPs. *See* TEX. CIV. PRAC. & REM. CODE § 27.009(a)(2).

Given that TCH is a multi-million dollar entity, a large fine is needed to meaningfully deter TCH and other corporate behemoths from continuing to pursue SLAPPs. Following this principle in two recent cases, Judge Sandill fined Schlumberger $250,000 under the TCPA. *See Exhibit "E"* , Order, *Schlumberger Ltd. v. Rutherford*, No. 2014-13621 (127th Dist. Ct. Aug. 27,

2014). As well, Judge Kirkland fined Landry's Inc. and Houston Aquarium, Inc. $450,000 under TCPA. *See Exhibit "F"* Order, *Schlumberger Ltd. v. Rutherford,* No. 2016-79698 (334th Dist. Ct. February 22, 2017). Kwok Firm requests a similar fine here of $500,000 as a result of bringing this litigation to deter similar actions in the future.

Moreover, TCH's conduct through their lawyers involved here bears aggravating circumstances such as (a) filing an improper TRO, (b) doing so at close of business on the Friday of Christmas break, (c) maliciously threatening contempt over and over again during the Christmas holiday under frivolous circumstances, (d) shielding their TRO affiant Tina Conlon from perjury, discovery, and actively avoiding a subpoena (witness and counsel), (e) admitting in court that affiant Conlon knew little about the facts of the case, (f) filing the TRO in retaliation to Kwok Firm's TRO filing just days before, (g) bringing baseless claims about consumer confusion in the face of clear Texas law in 16.103, (h) misrepresenting to the Court TCH had a trademark on the "promise" mark when they did not, (i) misrepresenting to the Court Kwok Firm filed for trademark protection on the "Broken Promise" mark for commercial use, omitting it was filed in part for news, (j) misrepresenting to the Court that proper witness Stacey Cook was "out of town" on December 21, 2018 when she testified she was "in town" and "available" to sign an affidavit but no one asked her to, (k) omitting to the Court the promise campaign had ended in November 2018, (l) using a different color and shaped background at the injunction hearing to convince the Court their promise mark had been copied by Kwok Firm when in fact TCH had copied Kwok Firm's background and shape, (m) misrepresenting to the US government in their trademark filing days before the injunction hearing that there were no competing claims to the "promise" mark despite filing suit against Defendants over the same mark, (n) knowingly waiving complaints about Kwok Firm's 6-day use of the "Broken Promise" mark by Baker Botts filing the "Broken Promise" mark as public record in at least 5 separate

filings with the Court, (o) making false statements to the media about Kwok Firm's case in order to "kill" a very public news story on the *Jacot* case, and gloating about it, (p) continuing this baseless action against Robert Kwok and Thomas Daniel individually just to drive up costs and expenses and unduly burden them, with nine (9) sets of discovery requests recently filed, and (q) many more abuses to be detailed at a later time and as found by the Court.

Defendants request expedited discovery related to this motion and such other and futher relief to which they may show themselves justly entitled.

CONCLUSION

For the reasons above, TCH's claims should be dismissed with prejudice. Additionally, the Court should award Kwok Firm their attorneys' fees, expenses, court costs and impose a substantial fine against TCH in accordance with the TCPA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Texas Rules of Civil Procedure 21 and 21a, a true and correct copy of this document was served on all counsel and parties of record the following counsel of record via eserve, email, fax, hand delivery, and/or, U.S. mail, on this 14th day of January, 2019.

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